No. 2876.

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UNITED STATES

Circuit Court of Appeals

For the Ninth Circuit

THE NORMA MINING COMPANY,
Appellant,

vs.

HUGH MACKAY,
Appellee.

Upon Appeal from the United States District Court for the District of Arizona.

BRIEF AND ARGUMENT OF APPELLEE.

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BRIEF AND ARGUMENT OF APPELLEE.

This is a suit to foreclose two mortgages upon the property of The Norma Mining Company, the appellant, an Arizona corporation, in Indian Secret Mining District in Mohave County, Arizona, given to Hugh Mackay, the appellee. The first mortgage was executed by The Norma Mining Company by R. T. Root, President, under the seal of the company, on the 2nd day of August, A. D. 1913, and was given to secure its promissory note of even date for Sixteen Thousand Dollars ($16,000), payable four months after date with interest at six per cent per annum. The second mortgage was executed by The Norma Mining Company by R. T. Root, President, under the seal of the company, on the 31st day of March, A. D. 1914, attested

by W. W. Root, Secretary, and was given to secure the sum of Five Thousand Dollars ($5,000), evidenced by two promissory notes of even date, one for Three Thousand Five Hundred Dollars ($3,500), and the other for One Thousand Five Hundred Dollars ($1,500), payable on or before May 1st, A. D. 1914 with interest at the rate of seven per cent per annum. The first mortgage recites:

> "This instrument is hereby executed and delivered by R. T. Root as President, by order of the Board of Directors of this company, and said execution and delivery is duly ratified by a meeting of the stockholders of the company, at which all shares of stock issued was represented and unanimously voted in favor thereof." (p. 168).

The second mortgage contains the following recitals:

> "the execution of this mortgage was duly authorized by a meeting of the stockholders of said The Norma Mining Company, at which meeting all of the shares issued and outstanding were present or represented and voted in favor of a Resolution authorizing the execution and delivery hereof, and was also authorized by a Resolution of its Board of Directors, duly adopted by unanimous vote at a meeting at which all of the directors of said company were present," (p. 174)

and

> "there is a mortgage by aforesaid grantor to aforesaid grantee on said property for Sixteen Thousand Dollars ($16,000) and some taxes, all of which the grantor will pay." (p. 175).

The Bill of Complaint in separate causes of action alleges the execution and delivery of said notes and mort-

gages for a valuable consideration, and that default had been made in payment and prayed for judgment, and that the mortgages be foreclosed.

The appellant filed its Answer denying the execution or delivery of the promissory notes and mortgages in suit, denying that the President, at the time of the execution, was authorized, and if the said note was executed by the said The Norma Mining Company by R. T. Root, President, as alleged in the Complaint, said execution was wholly without its authority or consent and out of the course of its regular business and without consideration, and had never been ratified. After thus alleging, the Answer sets up that there had been personal loans between the appellee and R. T. Root, the then President of the appellant company; that at the time of the execution of the first mortgage the appellee was in need of money and requested the said Root to help him by giving him some notes or securities upon which he could raise money. Whereupon the said Root, without authority, as it is alleged, or knowledge of the Board of Directors of the appellant and without any consideration of any kind or nature whatsoever moving to the appellant, executed in the name of the corporation, and conditionally delivered said Sixteen Thousand Dollar ($16,000) note and mortgage, and that as to the second mortgage and two notes aggregating Five Thousand Dollars ($5,000), it alleges that said notes and mortgages were made by R. T. Root, its then President, upon personal matters and dealings between said Root and the appellee, and had no relation to any business or interest of the appellant and without any consideration moving to the appellant, and without its knowledge or authority, and were conditionally delivered to the appellee.

Although not required by Equity Rules (Rule 31) a Reply was filed. This Reply has not been made a part of

the Record here. It was in the nature of denial of the new or affirmative matter contained in the Answer. Upon the issue thus joined the case was tried. The trial was begun at Prescott, Arizona, in August, 1915, and concluded at Phoenix in January, 1916. A judgment and decree was entered in favor of the appellee foreclosing said mortgages.

The appellant, feeling aggrieved by this judgment and decree, has prayed an appeal to this court and assigned certain errors, which we will briefly discuss and endeavor to show that the court committed no error against the appellant in entering said judgment and decree.

I.

In regard to the first Assignment of Error, which Assignment presents the question of whether or not the Minute Book and records of the company are the best evidence and conclusive in absence of fraud or mistake as to the action of the Board of Directors, Prof. Wigmore's remarks in his work on evidence, Vol. II, Sec. 1346, are pertinent:

> "There are innumerable cases in which a writing is regarded as the sole and exclusive object of proof because of the parole evidence or integration principle. This principle assumes that, by some provision of law, or by the parties' intent, the act effective in law is a single written memorial, and that no parole act is to be regarded as of any effect for the purpose. Where this is the situation, it is obvious that the terms of the writing are alone to be proved; the writing must be proved. Here it is clear that the writing is not 'evidence,' nor 'conclusive evidence,' of the act; for it *is* the act. That the writing cannot be shown to represent inaccurately some

prior parole conduct, is not because the writing is conclusive evidence of what that parole conduct was, but because the parole conduct is immaterial and ineffective, and therefore cannot be proved at all. It is not because we trust conclusively to the writing's testimony of what the parole conduct was, but because we do not care what the parole conduct was and are not allowed to ascertain.

"In consequence of this principle of integration, then, the question is constantly presented whether a specific writing has become the sole act material to the case; and this is purely a question of the substantive law applicable to the kind of transaction involved. * * * For example, whether a corporate record can be shown to be incorrect depends on whether by the substantive law a corporate doings, to be effective, must be done in writing."

Prof. Wigmore on this subject later says in Section 2451:

"Whether the acts of a corporation must at common law be integrated in a written record is a question which has given rise to a great variety of opinions and of practice."

Citing Bank vs. Dandridge, 12 Wheat., 64, 67, 69, decided in 1827, in which Judge Story says:

"In ancient times it was held that corporations aggregate could do nothing but by deed under their common seal. But the rule has been broken in upon in a vast variety of cases in modern times and cannot now, as a general proposition, be supported. We do not admit, as a general proposition, that the acts of a corpora-

tion, although in all other respects rightly transacted, are invalid merely from the omission to have them reduced to writing unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force."

Prof. Wigmore, in Sec. 2451, continues:

"Though the modern tendency is to apply no different rule to corporate than to natural persons. Whether the proceedings of a corporate meeting are subject to the same rule is a distinct question and the analogy of judicial records here makes for preserving the same compulsory rule but again the modern tendency is to leave the transaction without legal restriction."

In the footnote Prof. Wigmore cites cases beginning with 1824 which show the growth of this modern tendency until at present the rule appears to be

"that the action of a Board of Directors may be proved by parole."

In Zalesky vs. Ia. Insurance Co., 102 Ia., 512, 70 N. W. 187, an offer was made to prove the action of a Board of Directors but was excluded on the ground that it was not the best evidence. The court in reversing the trial court says:

"It will be observed that no record was made of the action of the Board and there was no written evidence of the conclusion arrived at. It rested in the memory of individuals who were present and their recollection and statements as to what was done was the best and only evidence attainable. There is no statutory requirement that such matters should be in writing

and we know of no good reason for holding that parole evidence is not admissible in such cases. Indeed it has been so often held that where no records are kept or the proceedings are not recorded, parole evidence is admissible to show what was resolved upon and by what vote it was carried that it may be said to be the unanimous voice of authority that such proof may be given. The evidence offered was not only the best evidence of which the case was susceptible, but it was also competent to establish the facts sought to be proved.''

Teneick vs. R. R. Co., 41 N. W., 905, (Mich.); Kramm vs. The Proprietory Co., 12 Me., 354; Bank vs. Dandridge, 12 Wheat., 69, and numerous other authorities.

In Boggs vs. Lakeport, etc. Association, 111 Calif., 354, 43 Pac., 1106.

''While the records of the corporation are usually regarded as the best evidence of the action of the Board, yet upon an issue whether a Resolution was passed anthorizing a given contract or conveyance, the fact may be proved by parole.''

It is stated in Vol. II, Thompson on Corporations, 2nd Edition, Sec. 1847:

''The doctrine is now almost universally recognized that parole evidence is admissible to prove the unrecorded acts and transactions of the corporate body or of its directors. This applies especially to third persons dealing with the corporation. The reason for the rule is obvious. The transactions are all within the circle of the corporation functions and the duty to record is devolved upon the corporation itself or

by some officers selected by it, and failure to perform a duty in this respect ought not to prejudice the rights of third persons dealing with the corporation. It necessarily follows that the acts of a corporation in the absence of record may be proved by the testimony of competent persons. And where no minutes are kept of the proceedings of a meeting, they may be proved by parole."

In Allis vs. Jones, *et al.*, 45 Fed., 148:

"Upon an issue whether the execution of a mortgage by the President and Secretary of a corporation was authorized by its Board of Directors in whom the control and management of its affairs was vested, parole evidence is admissible to prove the action of the Board when the record of the meeting fails to state it."

Judge Caldwell in deciding the case says:

"Parole evidence is admissible to prove the action of the Board of Directors or Stockholders where the record fails to state it."

II.

The second and seventh Assignments of Error can best be considered under one head because in the final analysis they are controlled by the same legal principle. The second assignment of error is based solely upon the ground that a certain question propounded by counsel for appellee was not within the rule of the trial court granting a continuance of the case. The Record does not disclose clearly that the testimony of Mr. Walter W. Root was to be so limited as stated in appellant's second assignment of error. All that appears in the record on this question is to be found in the

statement of Mr. Stoneman of counsel, p. 116, in moving the continuance for a sufficient number of days to enable appellant to secure the presence of W. W. Root who would testify that there was no such meeting held. The trial court continued the hearing "to take the testimony of W. W. Root" and other witnesses (p. 118). As stated, it does not appear in the Record that the testimony was to be so limited but for the sake of argument, grant that to be the case. The question complained of was not propounded to prove the execution of the mortgage in question. Its execution was admitted by the President, R. T. Root (p. 41). The execution of these mortgages is also admitted in the pleadings (p. 14). The second mortgage and the one concerning which the question was propounded, contained the recital:

> "The execution of this mortgage was duly authorized by a meeting of the stockholders of said The Norma Mining Company, at which meeting all of the shares issued and outstanding were present or represented and voted in favor of a resolution authorizing the execution and delivery hereof, and was also authorized by a resolution of its Board of Directors duly adopted by unanimous vote at a meeting at which all of the directors of said Company were present."

This mortgage was signed by one W. W. Root as Secretary.

The purport of Mr. W. W. Root's testimony on direct examination was to show that there was no meeting of the Board of Directors of The Norma Mining Company authorizing the mortgages in question. The reason for asking on cross examination the question excepted to was to contradict the purport of such testimony by showing that Mr. Root himself had signed a deed in which he had said there was such meeting. This was clearly within any

limitation that the court put upon the examination of this witness at the time when the continuance was granted. At the conclusion of the Re-direct examination of the witness the Court interrogated him further along this line asking the witness if he read the mortgage when he signed it, etc. (pp. 150-1), thereby showing the interpretation the court himself put upon the order of continuance.

The record no where discloses the exact language of the alleged stipulation and agreement as to the continuance of the case or even the substance thereof in relation to this witness. It would be impossible for this court to determine whether or not the ruling of the trial court was contrary thereto unless the same was set up in full or the substance thereof fully given.

Relative to Assignment of Errors VII, the appellant contends that the trial court erred in sustaining the objection of appellee to interrogatories 5, 6, and 13, propounded to Mrs. Root. The ground of appellee's objection was that the same did not come within the rule of the court permitting the taking of the deposition. The trial court, when the application to take the deposition was made, very clearly stated upon what subjects he would permit the interrogatories to be propounded, as follows: (p. 117)

> "I will permit them to take the interrogatories to confirm or deny the conversation to which the witness testified here but I cannot permit them to take the deposition with reference to the ownership of that stock."

Having this before us a simple reading of the three interrogatories makes it clear that on the ground interproposed by appellee they were all properly excluded. Interrogatory No. 5 reads as follows:

> "State whether you ever had any knowledge or information of the execution of either or any

mortgage of The Norma Mining Company property."

This in no manner, in no way, confirms or denies the conversation or conversations testified to.

Interrogatory No. 6 reads:

> "Please state what interest, if any, you had in The Norma Mining Company."

This likewise plainly neither confirms or denies any conversation and very nearly, if not actually, comes within the express inhibition that the Court would not permit the taking of the deposition with reference to the ownership of the stock.

Interrogatory No. 13 reads:

> "Was the company indebted to your husband, Mr. R. T. Root, in any amount."

This question relates to nothing that would confirm or deny the conversation.

Counsel for appellant admits that the interrogatories were not strictly within the rule because it does not touch the conversation. Mr. Stoneman stated:

> "I agree with your Honor that it is not strictly within the rule because it does not touch the conversation." (p. 153).

The appellant argues in addition that the interrogatories and answers thereto and each of them were material and relevant to the issues in the case. The Court granted the continuance to take the deposition upon the ground that appellant might have been surprised in regard to certain conversations testified to and permitted the interrogatories to confirm or deny such conversation. If every question that might be material or relevant to the issues in the case had been per-

mitted to be asked, it would have meant that the whole case would have been opened up. In fact the Court gave that very reason for limiting the interrogatories. The appellant further argues that this evidence should have been permitted because the Court had permitted the testimony of Mr. Elmer Sykes contending that the latter's testimony did not come within the rule. Appellee contends differently. The Court wished to hear the testimony of Miss Saunders and "any other person who was present at the meeting." (p. 118). Mr. Sykes clearly came within the rule.

Both Assignments of Error are based on the admission or rejection of evidence on the ground that the evidence was without the rule granting a continuance. We urge that the whole subject was a matter within the discretion of the trial court and not subject to review in an appellate court.

In the case of Copper River Mining Co. vs. McClellan, 138 Fed., 333-339, it is said:

> "A continuance is not a matter of right but it rests in the sound discretion of the trial court whose ruling thereon is not subject to review in an appellate court unless there has been an abuse of discretion."

In Yarde vs. Baltimore and O. R. Co., 57 Fed., 909-13, Judge Thayer says:

> "The plaintiffs in error finally insist that the circuit court erred in overruling their motion for a continuance. There are two good and sufficient answers to this assignment.
>
> "In the first place the record shows that no exception was taken to such a motion in the circuit court and in the second place a motion for a continuance is addressed to the sound discre-

> tion of the trial court and its action overruling such a motion cannot be reviewed by a writ of error. This has long been the rule in the United States Supreme Court and the doctrine is binding upon this court."

Drexel vs. True, 74 Fed., 12-13, is to the same effect, Judge Caldwell in deciding the case says:

> "It is assigned as error that the court refused to continue the case upon application filed by plaintiff in error. A continuance is not a matter of right but is a matter resting in the sound Judicial discretion of the lower court whose ruling thereon is not the subject of review."

In the light of these cases it seems that the granting or refusing of a continuance is a matter within the discretion of the trial court. It would also appear that the trial court could have refused to hear any further evidence at all after the case was closed at Prescott and such a ruling would not be the subject of review. Also the trial court could have continued the case for all purposes and such a ruling would not be a subject of review.

Now if the trial court could have refused to hear the evidence which appellant claims comes within the rule allowing a continuance by refusing to allow the motion for a continuance, and could also allow all material and relevant evidence to be admitted on a ruling continuing the case for all purposes, it would seem that any limitation on the evidence to be taken at a continued hearing was purely a matter of discretion, and not a proper subject for review. It was a self-imposed restriction, and the court's own rule and one which would be within the discretion of the trial court to interpret.

III.

Appellant's third, fourth, fifth and sixth Assignments of Error are so indissolubly linked together and dependent upon whether or not the mortgages and notes were authorized, and what consideration was authorized to be accepted for their execution and delivery, all of which was fully covered by the testimony in regard to the meeting of the Board of Directors and stockholders that it would seem well to consider these Assignments of Error under one heading.

Appellant declares in the sixth Assignment of Errors that the trial court erred in finding that the mortgages sued upon were made, executed and delivered by the appellant or were authorized by it in that the minute book put in evidence shows that said mortgages or either of them were not authorized by the company and were not made, executed and delivered with the knowledge and consent of said company. The truth is that the minute book, as introduced in evidence *now,* shows nothing about these mortgages. There is no record in the minute book, as introduced in evidence, of any meeting either of directors or stockholders authorizing their execution. As to whether or not evidence could be introduced to vary, add to or even contradict the record has been fully and conclusively covered under subdivision I of this brief.

Appellant declares in his sixth Assignment of Errors, that there was no legal evidence introduced to vary or contradict the record. We contend that there was a meeting of the stockholders followed immediately by a meeting of the Board of Directors, that minutes were prepared of these meetings in typewritten form and placed in the minute book. Upon the production of the minute book these minutes are found to be missing, and there is no record in the minute book of any such meetings. There being no record in the minute book of such meet-

ings, we offer parole evidence to prove that there were such meetings, what transpired at the meetings, and that minutes of the meetings were prepared and what the minutes were. From a reading of the Record in this case we are confidently of the opinion that the meetings of July, 1913, are abundantly proven.

(1) The mortgages themselves recite that they were properly authorized by a meeting of the directors, and a meeting of the stockholders (pp. 168 and 174).

(2) The appellee, Mr. Hugh Mackay, testifies that Mr. Root told him that Mr. Lowery was a director of the company (p. 51); that a meeting to authorize the execution of the mortgages up to Twenty-five Thousand Dollars ($25,000) was held, and all of the shares of stock exhibited, Mr. Root declaring he owned every share of stock; that a Resolution authorizing the execution of the mortgages was voted on (p. 52); that a directors' meeting was held (p. 52); that there were present Mr. Walter Root, Mr. Lowery and Mr. R. T. Root (p. 52).

(3) Mr. F. W. Lowery, who has no interest in this case, likewise testifies as to the fact of the meetings, and who were present, and the place and time of holding the same (p. 101). He was a director, vice-president and secretary of the company (p. 102); that Mr. Root stated he owned all of the shares of the corporation outside of the directors' shares and produced the certificates (p. 103); he described all of the certificates (p. 105); that a resolution authorizing the mortgages was adopted by unanimous vote (p. 102). He further testifies that he prepared the minutes of the meeting at the time and while the meeting was in progress (p. 101). He produced the original manuscript draft of such minutes (p. 102). They were offered and introduced and read in evidence as plaintiff's Exhibit W (pp. 102 and 103).

(4) Miss Jessie Saunders, the stenographer, remembers distinctly the meeting, and positively who were present (p. 125). She recalls writing a paper for Mr. Lowery; remembers distinctly that it was written out in long hand for her to transcribe (p. 126):

> "I made an exact copy of what Mr. Lowery handed me, and that was this that has been exhibited to me by Judge Baker, plaintiff's Exhibit W." (p. 124).

She gives reasons for remembering the meeting:

> "I remember this one because of the fact of Mr. Lowery standing right beside my desk and mentioning the matter to Mr. Sykes why the meeting was being held." (p. 125).

After writing the paper she gave it to Mr. Lowery. She made a carbon copy.

(5) Mr. Elmer Sykes is equally positive as to the holding of the meeting. He was not an employee of Mr. Lowery. The meeting was held in his office (p. 135). The doors were open (p. 135).

> "There were present Mr. R. T. Root, Mr. Walter Root, Mr. Mackay, Mr. Lowery, myself and Miss Saunders." (p. 131).

Saw Mr. Lowery hand Miss Saunders a paper to transcribe, and read the carbon copy (p 132); knows that plaintiff's Exhibit W is the same as he remembers the paper written by Miss Saunders (p. 133). He was present in the suite of rooms where the meeting was held with the doors open, in a sense participated in the meeting by reading over the carbon copy of the minutes at the time it was written to see that it was all right, as was his custom with all such matters (p. 132).

(6) Dr. W. J. Geiermann, a disinterested witness of Altadena, California, testified that Mr. Root told him that a meeting of the Board of Directors had been held and a resolution passed authorizing such loan in order to avoid the possibility of any technical objection, although he did not consider it necessary because he owned all the stock (p. 115).

Mr. F. W. Lowery further testified that he examined the minute book introduced in evidence (Defendant's Exhibit No. 21), at different times subsequent to July, 1913. In September of that year he examined the minute book and the minutes of the July, 1913, meeting were in the book in typewritten form, loose leaf, not written in the minute book in manuscript (p. 100). About the middle of 1914 he also examined the minute book and there was no record in that book of minutes as they appear now from pages 15 to 17 (p. 99).

Mr. R. T. Root testified that he wrote those minutes. They were not written at the time the meetings were held, but a good while since (p. 35). He further testified that he held Mr. Lowery's resignation as director, to be accepted at any time (p. 42). Mr. Lowery testified that his resignation was signed and left undated in the minute book of the company from the time the company was first organized (p. 98). He further testified in response to interrogatory by the Court:

> "My resignation as secretary or director of The Norma Mining Co., which I executed on the formation of the company, was never acted upon by the Board of Directors prior to July, 1913. I was never notified by any person that my resignation had been accepted up to this time (the time of trial). I was never notified of any such meeting." (pp. 109-10.)

The Articles of Incorporation which were read into the record in this case and which are copied at length in the minute book (Defendant's Exhibit No. 21), give to the Board of Directors authority to conduct the affairs of the corporation. This is the general law and the law of the State of Arizona, where the company was incorporated. It is conclusively proven in this case by the recitals in the instruments, by the testimony of the witnesses, by the draft of the minutes (Plaintiff's Exhibit W), that a meeting where all the stock was represented was held, and that the Board of Directors, having authority to transact the business of the company, met in July, 1913. What took place is equally clearly proven. The execution and delivery of these mortgages to Mackay were authorized in consideration of the cancellation of the indebtedness of the company to its President, R. T. Root, to the amount of the mortgages to be issued up to Twenty-five Thousand Dollars ($25,000) (plaintiff's Exhibit W; also Mr. Lowery's testimony, pp. 101-2). This authority was given by Resolution unanimously adopted (p. 102). Appellee testified that Mr. Root stated at the meeting:

> "The company owes me approximately Thirty Thousand Dollars ($30,000). I don't know the exact figures, but Mr. Lowery there does;"

and

> "Any mortgage that is issued for money for me or for my use to the extent of that amount, there is no one on earth that can find fault with it." (p. 52).

Mr. R. T. Root admits there was a record kept of the outlay and expenses he paid for the operation of The Norma Mining Co. (p. 37). Mr. Lowery testified that

there were charges against The Norma Mining Co. on account of operating. Any money that was expended was to be repaid. It was regarded at all times as an indebtedness to Mr. Root (p. 112). That when it became involved or there was a possibility of becoming involved, and it became necessary to figure what that indebtedness was, it aggregated Thirty Thousand Five Hundred and some odd dollars (p. 113).

Against this formidable array of evidence is the testimony of Mr. R. T. Root and W. W. Root, who signed the mortgages with the recitals therein as to the meetings. The former admits that he paid the development of the property in his own name, paid all expenses of operating, always has been general manager, procured the funds and paid the expenses in his individual name, kept a record of the expenses (p. 37), admits that he got the money from Mr. Mackay; that he has not paid anything on the notes or on the mortgages (p. 46); admits that Mr. Mackay had security for it. He had the mortgage as security (p. 46).

It cannot, therefore, be successfully contended that these mortgages were executed without authority, or that no consideration passed to the company for their execution. When these mortgages were executed in accordance with the Resolution, automatically the debt of the corporation to Mr. Root was cancelled to the amount thereof. The corporation having received a full consideration by the cancellation of its indebtedness to Mr. Root, unconditionally delivered the notes and mortgages to Mr. Mackay when they were executed. The arrangement as to the disposition of the mortgages after their execution was wholly a matter between Mr. Root and Mr. Mackay.

It appears that at the time of the meeting of July, 1913, Mr. Root was indebted to Mr. Mackay in a large amount, for which he held Mr. Root's checks on banks

where Root had not money to pay them (defendant's Exhibits Nos. 3 to 8, 17; and one for Seven Hundred and Fifty Dollars ($750) not in evidence, but testified to). This indebtedness was largely from funds belonging to an estate. It was their desire to dispose of the mortgage or mortgages so that Mr. Mackay might be reimbursed. To that end they went to Los Angeles, California, and for some time tried to do this. Not being able to accomplish their purposes there, and knowing of a party who was in Denver that might take it, a mortgage was prepared on August 2, A. D. 1913, for Sixteen Thousand Dollars ($16,000), and Mr. Mackay came to Denver but was unable to dispose of the mortgage. He returned to Los Angeles and on August 25, A. D. 1913, agreed with Mr. Root that he would take the mortgage himself, and thereupon delivered to Mr. Root his aforesaid checks (p. 87). This was an arrangement wholly between Mr. Root and Mr. Mackay.

IV.

With reference to Assignments Nos. VIII and IX, it is contended the judgment on the first mortgage should not have been in excess of Ten Thousand Dollars ($10,000), and on the second mortgage in excess of One Thousand Eight Hundred Dollars ($1,800) with interest thereon in each case. While it is clear that as between the appellant and the appellee, it having received a full consideration for its mortgages by the cancellation, *pro tanto,* of its indebtedness to Mr. Root, and while counsel for the appellant did not desire an accounting between Mr. Root and Mr. Mackay (see statement of Mr. Aldrich, counsel for appellant, p. 32), the appellee was prepared at the time of trial and showed conclusively that even as between himself and Mr. Root the full cash face value of the mortgages were paid by appellee to Mr. Root. This

was very clearly proven by the testimony of the appellee and the incontrovertible exhibits filed. For convenience of the court and counsel, we will tabulate the exhibits and show the correctness of the amounts:

FIRST AS TO THE $16,000 NOTE.

Defendant's Exhibit 3, June 9, 1913, check of R. T. Root, payable to Hugh Mackay.....	$ 1,543.76
Defendant's Exhibit 4, June 9, 1913, check of R. T. Root to Hugh Mackay.....	4,986.72
Defendant's Exhibit 5, May 29, 1913, check of R. T. Root, payable to Hugh Mackay.....	416.81
Defendant's Exhibit 6, May 23, 1913, check of R. T. Root, payable to Hugh Mackay.....	500.00
Defendant's Exhibit 7, May 29, 1913, check of R. T. Root, payable to Hugh Mackay.....	1,288.89
Defendant's Exhibit 8, June 11, 1913, check of R. T. Root, payable to Hugh Mackay.....	300.00
	$ 9,036.18
In addition to the foregoing checks, there was Defendant's Exhibit 17, mentioned in Defendant's Exhibit 16 (pp. 202-203), June 19, 1913, check of R. T. Root, payable to Hugh Mackay	$ 1,000.00
Appellee testifies at pp. 56 and 57 and elsewhere (pp. 79 and 80) that he held Mr. Root's check for money given to Mr. Root and payable to Mr. Mackay, dated May 29, 1913, for.....	750.00
Appellee also testifies that he gave Mr. Root on July 24 (p. 57, also p. 71).....	100.00
Charged as cash (pp. 57 and 70).....	250.00
Appellee testifies he gave Mr. Root credit for two years' interest on another loan of $14,000, due from Mr. Root, evidenced by receipt (pp. 57 and 75), amounting to.....	1,680.00

The interest was calculated on checks from their dates to August 2, 1913, the date of the mortgage, $120.63, and on a note of $3,250, from April 22, 1913, to August 2, 1913, $63.19 (pp. 57, 80 and 81)	183.82
	$13,000.00
Appellee testified that Mr. Root owed him $2,568.40 on notes, plaintiff's Exhibits T and U (pp. 189 and 190), secured by bonds, which bonds Mr. Root obtained from him to sell to pay the amount, and upon which bonds Mr. Root received the money but failed to pay (pp. 57, 72 and 73). (Plaintiff's Exhibit V.) As the notes were not there to be surrendered, appellee gave a due bill (Defendant's Exhibit 19) for	3,000.00
	$16,000.00

All of said checks were drawn by Mr. Root on banks wherein he had not money to meet them, and were surrendered by appellee to Mr. Root August 25, 1913, when appellee took the Sixteen Thousand Dollar ($16,000) note and mortgage and gave the Three Thousand Dollar ($3,000) due bill.

The appellee testified (p. 75) that this Three Thousand Dollar ($3,000) due bill was paid by crediting the $2,568.40 and interest, represented by the notes above mentioned and paying the balance in cash by giving Mr. Root two or three checks and telling Mr. Root what had been done and to which Mr. Root assented (p. 85).

SECOND, AS TO THE $5,000 NOTE.

The appellee testified as shown (at pp. 59, 60, 61 and 62), that about March 2, 1914, Mr. Root telegraphed his

son, Herbert, requesting appellee to go to New York; that he went there and found Mr. Root and his son, Walter at the McAlpin Hotel, in bad shape for money, with hotel bills and different things; that Mr. Root had a deal on to get a large sum of money but required at least Four Thousand Dollars ($4,000) (pp. 59 and 60). The plan of Mr. Root was to make a new mortgage on this Arizona property for a larger amount, provided it could be placed with someone and pay off the Sixteen Thousand Dollar ($16,000) mortgage and have some left for himself. Such loan could not be procured and finally an effort was made to place a second mortgage for the sum of Five Thousand Dollars ($5,000), but nothing could be done although offering a discount of One Thousand Dollars ($1,000). After waiting nearly a month, appellee got ready to start for Denver. He told Mr. Root that he might try to sell this second mortgage in Denver or raise money some way if he could. The mortgage and notes (plaintiff's Exhibits C, D and E) were prepared (p. 60) for Five Thousand Dollars ($5,000) and executed by The Norma Mining Company by Mr. R. T. Root, president, attest by his son, W. W. Root. Appellee was authorized to sell said mortgage and notes for Four Thousand Dollars ($4,000) or take it for Four Thousand Dollars ($4,000), either thing, notwithstanding that said notes and the receipt therefor (defendant's Exhibit 2, p. 193) are for Five Thousand Dollars ($5,000). Appellee came to Denver. Mr. Root's son, Walter, followed him. (p. 60). Came to appellee in Denver and told him that they had made checks on The German-American Trust Company for One Thousand Eight Hundred Dollars ($1,800) and had no money, and that if these checks were not paid they would be ruined. Appellee could not get anyone in Denver to buy the second mortgage, so decided to take it himself and procured for the son a check to meet the checks on The German-American

Trust Company and paid the balance shortly thereafter, as appears by the following table of exhibits:

Plaintiff's Exhibit H, check, 4-6-1914, Robinson & Robinson, endorsed: "Pay to the order of W. W. Root, Hugh Mackay (p. 180) . .	$ 1,810.00
Plaintiff's Exhibit I, check April 8, 1914, Hugh Mackay to W. W. Root (p. 181)	80.00
Plaintiff's Exhibit J, check April 9, 1914, Hugh Mackay to W. W. Root (p. 182)	150.00
Plaintiff's Exhibit K, check March 18, 1914, Wells County Abstract & Investment Co. to Hugh Mackay, by him endorsed to R. T. Root (p. 240)	105.00
Plaintiff's Exhibit P, check April 21, 1914, Hugh Mackay to W. W. Root (p. 187)	7.00
Plaintiff's Exhibit L, check April 22, 1914, Hugh Mackay to W. W. Root (p. 183)	1,000.00
Plaintiff's Exhibit M, check April 22, 1914, Hugh Mackay to W. W. Root (p. 184)	500.00
Plaintiff's Exhibit N, check April 23, 1914, Hugh Mackay to W. W. Root (p. 185)	125.00
The amount of commission Mr. Mackay had to pay to borrow a portion of the money . . .	40.00
Plaintiff's Exhibit O, check April 25, 1914, Hugh Mackay to W. W. Root (p. 186)	183.58
Total	$4,000.58

Appellee further testified (p. 63), that he paid several amounts in addition to the above Four Thousand Dollars ($4,000), two of these items being plaintiff's Exhibits Q and R (pp. 188 and 189), the former for the sum of Four Hundred and Fifty Dollars ($450) and interest, and the latter for Five Hundred Dollars ($500) and interest.

Appellee testified that at the time of the trial, August, 1915, at Prescott, Mr. Root owed him Four Thousand Dollars ($4,000) over and above the amount of the two mortgages (p. 65).

There has been introduced in evidence certain demand notes made by R. T. Root, payable to Hugh Mackay, being defendant's Exhibits 9 to 15, both inclusive. These demand notes were given by Mr. Root instead of his endorsing the Company's note, and were made at the time of the delivery by Mr. Root to Mr. Mackay of the Sixteen Thousand Dollar ($16,000) note, August 25, 1913, in Los Angeles and dated back to the dates of the original advances or a mean date where the advance was in several items of different dates, as follows:

Defendant's Exhibit No. 9, dated September 16, 1911 (p. 197)	$ 4,455.00
Defendant's Exhibit No. 10, dated December 13, 1911 (p. 198)	1,400.00
Defendant's Exhibit No. 11, dated December 19, 1912 (p. 199)	1,655.00
Defendant's Exhibit No. 12, dated April 22, 1913 (p. 199)	3,250.00
Defendant's Exhibit No. 13, dated May 23, 1913 (p. 200)	1,550.00
Defendant's Exhibit No. 14, dated June 19, 1913 (p. 200)	1,100.00
Defendant's Exhibit No. 15, dated August 2, 1913 (p. 201)	2,590.00
	$16,000.00

Defendant's Exhibit No. 9 corresponds to defendant's Exhibit No. 4 with interest to the date of Defendant's Exhibit No. 4, June 9, 1913, and is also shown in Defendant's Exhibit No. 32. This latter exhibit illustrates how it was done, the mean date being September

16, 1911. It also shows the interest, $531.72, and the amount for which one of the checks of date June 9, 1913, was given (Defendant's Exhibit No. 4).

Defendant's Exhibit No. 10 corresponds to Defendant's Exhibit No. 3 with interest to June 9, 1913, treated in a similar manner.

Defendant's Exhibit No. 11 corresponds to defendant's Exhibits Nos. 5 and 7.

Defendant's Exhibit No. 13, corresponds to Defendants Exhibit No. 6 and the Seven Hundred and Fifty Dollars ($750) mentioned in the testimony (pp. 29 and 30).

Defendant's Exhibit No. 14 corresponds to Defendant's Exhibit No. 17 and One Hundred Dollars ($100) cash (p. 72).

The endorsement on the back of Defendant's Exhibit No. 15 (p. 201) explains exactly what it was for, namely, interest to August 2, 1913, notes 1 to 6 therein referred to being Defendant's Exhibits No. 9 to 14, inclusive, as an examination of those exhibits will disclose.

Defendant's Exhibit No. 12 is made up of Two Hundred and Fifty Dollars ($250) in cash and a due bill for Three Thousand Dollars ($3,000) (p. 86).

It will, therefore, be seen from the exhibits themselves that Mr. Root received from Mr. Mackay the full face value of the Sixteen Thousand Dollar ($16,000) note, and at the time of taking the Five Thousand Dollar ($5,000) note or shortly thereafter Mr. Mackay paid to Mr. R. T. Root or to Mr. W. W. Root for Mr. R. T. Root, as authorized in Defendant's Exhibit No. 2, Four Thousand Dollars ($4,000), and later by reason of having to make good certain guarantees paid the full amount of Five Thousand Dollars ($5,000). The trial court allowed only the Four Thousand Dollars ($4,000) with interest. With that allowance the judgment for Sixteen

Thousand Dollars ($16,000) and interest, amounting to Eighteen Thousand Four Hundred Thirty-four Dollars and Sixty-six Cents ($18,434.66) and Four Thousand Dollars ($4,000) and interest, amounting to Four Thousand Five Hundred Twenty-three Dollars and Forty-three Cents ($4,523.43) is absolutely correct and the figures are incontrovertible.

V.

In addition to the fact that the mortgages were thus duly authorized and executed for a valuable consideration moving to the appellant, complying with every legal requirement, there remains the further fair deduction from all the evidence, and especially the testimony of Mr. Root himself, that Root was the corporation and the corporation was Root. All of the stock represented by certificates assigned in blank was either held by him or by his family in such a way that it lay in his mouth to say that it was his. Even the share that was in the name of Mr. Lowery was assigned in blank and left in the certificate book, his resignation as a member of the Board of Directors was likewise on file undated all from the very beginning of the company. The trial court did not allow Director and Stockholder Lowery to testify concerning the ownership of the stock, because he had been admitted to the bar in his youth in Iowa, but had never practiced, and being in the employ of Mr. Root, was under his constant retainer. Was a part of Mr. Root. The other one share director was Mr. Root's son. His share, according to the undisputed testimony, was likewise left in the book, assigned in blank. All the other shares except one were issued to a Mr. McDermott, also then an employee of Mr. Root. They were likewise held assigned in blank, not transferred on the books of the company. The only share not so assigned was the one share stand-

ing in the name of Mr. Root. All of this is fully corroborated by the stock certificate book (Defendant's Exhibit No. 29). Mr. Root testified that he transacted all of the business of the company in his individual name, procured all the funds for its operation, gave options in his own name for the sale and delivery of all of its holdings, to him the purchase money was to be paid. (Plaintiff's Exhibit F, pp. 177-9.) While every legal step for the validity of these mortgages is present, as previously shown herein, we submit in addition, that in fact and in truth Root was the corporation, and the corporation was Root. He admits that he got the money and has paid nothing on any of the notes (p. 46). The checks with which the amount of the second mortgage was paid bear the endorsement of Mr. Root, and both sons, whom Mr. Root testified constituted the Board of Directors. Courts of equity, as occasions may require, are justified in looking behind the legal fiction of the corporation. The modern tendency of courts is to do that more and more, and where it appears that a corporation is but the double of an individual or individuals, the acts of the individual or individuals bind their double. For authority for this, if authority be necessary, we refer you to the admirable and exhaustive work of William W. Cook of the New York Bar, 6th Edition, Vol. 1, Sec. 6, and the cases there cited. The New York Court of Appeals has said:

> "We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth."
>
> Anthony vs. American Glucose Co., 146 N. Y., 407.

> "The corporate existence will be disregarded, and the acts and contracts of the per-

sons holding all the stock will be considered the acts and contracts of the corporation itself, where the effect is the same as though the corporation had acted or contracted as a corporation."

Cook on Corporations, Vol. 1, Sec. 32, 6th Ed., and cases cited.

Likewise Clark and Marshall lay down the principle that in such a case:

"A court of equity will look beyond the corporation regarded as a legal entity distinct from its stockholders."

Vol. 1, p. 24, citing Swift vs. Smith, 65 Md., 428 (57 Am. Rep., 336);
First National Bank of Gadsden vs. Winchester, 119 Ala., 168; 72 Am. St. Rep., 904;
Bundy vs. Ophir Iron Co., 38 Ohio State, 300;
1 Smith's Cases, 31;
Texarkana and F. T. Ry. Co. vs. Bemis Lumber Co., 55 S. W., 944;
Relley vs. Campbell, 134 Calif., 175; 66 Pac., 220.

While we believe it has been satisfactorily proven that Mr. Root was the real owner of all of the stock, he says it belonged to his wife, notwithstanding the records and his and her numerous statements to the contrary. He, however, admits that she learned of the mortgages soon after they were given (pp. 43, 45), although at least three witnesses aver she knew of them at or before the time of their execution (pp. 53, 105, 115), and

was desirous that they be made so that they (she and her husband) might get some of the money. She went with her husband and Mr. Mackay from Denver to Los Angeles, was there when the first mortgage was made. Was in New York when the second mortgage was executed, and three witnesses say she knew. Dr. Geiermann, an old acquaintance of the Root's, who was trying to get them a loan on this property (p. 115), Mr. Mackay, the appellee, and Mr. Lowery all so testify. The circumstances, the propinquity, the relationship, all bear mute testimony as to such knowledge.

> "Today there is no rule of public policy which prohibits a private corporation having a capital stock from becoming the accommodation indorser of commercial paper with the knowledge of all of its stockholders."
>
> "The question is who has been damaged. * * * The State is not damaged and cannot enjoin the act; *neither can a stockholder who assents or delays after knowledge of the act,* nor can the purchaser or transferee of stock which assented to the act, nor can a corporate creditor who is sure to be paid; nor can the corporation itself. * * * The theoretical idea that the act is *ultra vires* or that the corporation has exceeded its powers or has violated some shadowy principle of public policy is being rapidly abandoned and the courts are basing their decisions on the logical principles of damage suffered or threatened."

Cook on Corporations, Vol. 1, Sec. 3, citing cases.

Mrs. Root, therefore, even if she were a stockholder having knowledge, could not complain because, as stated in the text,

> "Neither can a stockholder who assents or delays after knowledge."

We are therefore persuaded that this court, sitting as a court of review, will not disturb the equitable and just judgment of the trial court.

VI.

Relative to Assignments of Error Nos. X and XI, which are general in their nature, they have been fully covered in discussing previous Assignments of Errors. The right to a deficiency judgment would follow in the event the security prove not to be sufficient upon sale to pay the judgment.

We do not presume it necessary to urge upon this court the advantages of the trial court in passing upon the evidence, but we wish to point out the exhaustive and painstaking inquiry the trial court made into all the facts surrounding the execution and delivery by appellant of the instruments sued upon.

Not having received a copy of appellant's brief within the time fixed by the Rules of this Court, we beg to reserve the right to make any and all legal objections thereto if any be later filed.

Respectfully submitted,

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